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IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903. No. 277.

NORTHERN SECURITIES COMPANY, J. PIERPONT MORGAN, ROBERT BACON, DANIEL S. LAMONT and others, Appellants, vs. THE UNITED STATES.	14 December, 1903.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF,

FOR THE APPELLANTS MORGAN, BACON AND LAMONT.

In view of the scope and detail of the elaborate arguments presented by the counsel for the appellant corporations, it is considered sufficient that these personal appellants should treat more particularly those questions which may be supposed to have been adjudicated directly by this Court, rather than attempt again to open the discussion of the general principles involved in this case.

The appellants, the Northern Pacific Railway Company and the Great Northern Railway Company, are common carriers engaged in the transportation of freight and passengers through various states. The Northern Pacific system extends from Ashland in Wisconsin via Duluth, Minnesota, and from St. Paul, Minnesota, across Minnesota. North Dakota, Montana, Idaho and Washington, passing through Helena, in the state of Montana, and Spokane, in the state of Washington, and extending to Tacoma and Seattle, in

Washington, and to Portland, in Oregon. The Great Northern system extends from St. Paul across Minnesota, North Dakota, Montana, Idaho and Washington, passing through Spokane and extending to Everett and Seattle, in the state last aforesaid. These lines connect with other railway lines, and, either directly or by means of such other railway lines, with lines of steamships on the Great Lakes and the ocean.

The petition alleges that early in the year 1901, these companies acquired control of the system of railway lines known as the Burlington system. This, however, is not shown to have any connection with the cause of action alleged, and is not suggested to have been in any respect contrary to law.

The Northern Pacific Rail*way* Company was formed in 1896, upon a reorganization of the Northern Pacific Rail *Road* Company. Its capital stock consisted of $75,000,000 preferred stock and $80,000,000 common stock, and the charter provided that the preferred stock might be retired at par on any first day of January up to 1917. Both classes of stock were made subject to a voting trust in this defendant Morgan and others, continuing until November 1, 1901, but terminable, in the discretion of the trustees, at an earlier date. The voting trust was accordingly terminated by the trustees upon January 1, 1901. Prior to that time, too, the retirement of the preferred stock was practically decided upon, but it was not made the subject of formal action by the Board of Directors until November 13, 1901, and it was completed upon January 1, 1902.

During the reorganization of the Northern Pacific Rail *Road* Company, the firm of J. P. Morgan & Company, of which these defendants, Morgan and Bacon, are members, acted as reorganization manager, and ever since has been the fiscal agent of the new company. Accordingly at all times the firm has desired to further the best interests of the new company and of all its stockholders, and especially to aid in steadily developing the business of the company and the prosperity of the country which it serves. The firm considered that these results were accomplished so far as possible by the policy of the company during the existence of the aforesaid voting trust. Not long after the termination of the voting trust, however, and very early in May, 1901, the firm became aware that unusually large purchases of the stock of the company were in progress in the stock market, apparently in a single interest. The firm was apprehensive that these purchases were for the purpose of securing control of the direction

of the Northern Pacific Company, and of thus managing it, not for what the firm conceived to be the best interest of the company, but for some ulterior purpose of which the firm was not informed. Accordingly, prior to May 7, 1901, the firm purchased common stock of the Northern Pacific Company in considerable amounts, and upon that day their holdings amounted to about two hundred thousand shares. In making these purchases, the firm acted on its own account, and in behalf of no other person whomsoever, and was actuated by no motives save those above stated.

For some years the defendant Hill and others who were interested in the Great Northern Company, but not including these defendants, contemplated the formation of a corporation which should purchase their separate interests in that company, with the general object that said interests should be held together, and that the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the territory served by it and should not, from time to time, be subject to radical change and possible inconsistency. In or about August, 1901, as this plan was approaching maturity, for similar reasons, said parties determined that they would also sell to such new company when formed their considerable interests in the Northern Pacific Company, and that the capital of such new company should be made large enough to enable it to purchase all shares of the Great Northern and the Northern Pacific which any holders thereof might desire to sell, and also any other shares which the new company might deem it advisable to acquire.

By this time it had become known that the above mentioned purchases in the market of the shares of the Northern Pacific Company had been made in behalf of a corporation known as the Oregon Short Line Railroad Company, controlled by the Union Pacific Railroad Company, and that in that interest there were held shares of the Northern Pacific Company to about the amount of $41,000,000 of preferred stock, which, however, were to be retired on January 1, 1902, and $37,000,000 of common stock, together making seven hundred and eighty thousand shares and constituting an absolute majority of the total capital stock of the Northern Pacific Company. Thereupon and therefore, with the view, and for the purpose of protecting the Northern Pacific Company and the holders of its common stock against the possible control and direction of the company in an adverse interest, these

defendants determined to sell, and advised their friends to sell their Northern Pacific stock to the new company.

Accordingly, upon November 13, 1901, the Northern Securities Company was organized pursuant to the Laws of New Jersey. It possesses all the powers set forth in its certificate of incorporation and has full power to do every act which in fact it has done. Neither the petition nor the proof contains anything to the contrary.

It becoming known then that the Oregon Short Line Company was not disinclined to sell its holdings of the major part of the Northern Pacific stock upon terms satisfactory as to price, the firm of J. P. Morgan & Company, deeming such action for the best interest of the Northern Pacific Company, purchased from said Oregon Short Line Company all its holdings of the capital stock of the Northern Pacific Company, agreeing to pay therefor partly in cash and partly in shares of the new company when formed.

After its organization the Northern Securities Company duly purchased all shares of the Northern Pacific Company and of the Great Northern Company hereinbefore mentioned (including those purchased by the firm of J. P. Morgan & Company from the Oregon Short Line Company), making payment therefor partly in cash and partly in its own shares. It was willing to purchase also the shares of any other shareholders of the Great Northern Company, who might desire to sell the same, for the price of $180 for each share of the Great Northern Company, payable in its own shares, and it actually did purchase and pay for considerable amounts of said stock at such price.

The foregoing states the material facts. The petition contains many adjectives, adverbs and conclusions which are unsupported by proof and which, of course, are without value in stating a cause of action, because the acts done being lawful the question of their intent is without importance. The only ground for relief pleaded in the petition is that the ultimate effect of these transactions may be in some degree to diminish competition between the Railway Companies, and that, therefore, they constitute a restraint of interstate commerce within the Federal statute known as the Sherman act (26 U. S. Stat., 209). This is not established by the proof, and in any case would not support the action.

The petition alleges that in the case of *Pearsall vs. Great Northern Co.*, 161 U. S., 646, it was held that the Great Northern Company was prohibited by the Minnesota statutes from acquiring

stock of the Northern Pacific Company. No such effort by the Great Northern has been charged or proved in the present case, and, of course, those statutes are no ground for relief in this Court. On the contrary, the action really taken was fully authorized by law, and the only question is whether it is to be defeated by the Federal statute on the ground just stated. It should be added, that in the Pearsall case the question involved only the power of the Railway corporation, while here no action whatever was taken by either of the Railway corporations. The present situation has resulted solely from the action of some (not all) of the stockholders, and it is settled by controlling authority that the rights and powers of stockholders are entirely distinct from those of the corporation itself (*Pullman Car Co. vs. Missouri Pacific Co.*, 115 U. S., 587).

So, too, the case of *Commonwealth vs. South Pennsylvania Railroad Co.*, 1 Penna. County Court, 214, January, 1886, affirmed by the Supreme Court of Pennsylvania, has no present application. There it was held that a constitutional provision against a railroad company controlling a parallel and competing line applied to its controlling the same by stock ownership. The question there was not whether the mere control restrained trade or commerce, but was simply whether a control of the stock carried a control of the railroad. The authority of that case is greatly weakened by *Commonwealth vs. Erie Co.*, 132 Penn. St. 591, decided in 1890. There it was held that one corporation owning all the stock of another did not thereby acquire or hold the real estate of the other so as to violate a statute against the former corporation acquiring or holding such real estate "directly in the corporate "name, or by or through any trustee or other device whatsoever, "unless specially authorized." But, the South Pennsylvania Railroad case has no present application, because, as just pointed out, in the present case there are here involved no such provisions of law and no such facts as were decisive there. Moreover, even if there were, under controlling authority the rights of the stockholders would not be affected by such limitations upon the power of the corporation (*Pullman Car Co. vs. Missouri Pacific Co., supra*).

If the Congress had intended to prohibit a transaction such as that now presented, it would have said so in terms as plain as those of the statutes adopted by the legislature of South Carolina in 1894 (Ch. 543) and very tardily by the legislature of Minnesota in 1903 (Ch. 86).

It is submitted that the judgment of the Circuit Court must be reversed, and that the action must fail, because (1) the transactions were lawful, and (2) if construed as applying to such transactions, the statute would be unconstitutional for then it would deprive the Securities Company of the right to purchase property, and the stockholders of the Railway Companies of the right both to sell their own shares, and to acquire an interest in the shares of others.

FIRST.

The transactions alleged are entirely lawful in their character.

These transactions have consisted merely in the organization of a lawful corporation of New Jersey, and in the sale to, and purchase by, it of property lawfully salable. All acts done in relation to the organization of the Securities Company, and to the purchase by it of the shares of stock of the Railway Companies, and to the sale thereof by the owners, were expressly authorized by law. The legal effect of the transaction has been that the owner of stock in one of the Railway Companies has sold the same to the Securities Company, and has received therefor stock of the Securities Company, which company owns the stock not merely of one of the Railway Companies, but the stock of both. So that each individual who has transferred his property to the Securities Company has obtained therefor something entirely different—namely, an interest in a company holding stock of the other Railway Company as well. It is manifest that in the fullest possible sense this constituted a sale of the property (*Berger vs. U. S. Steel Corp.*, N. J., Oct., 1902; 53 Atl. Rep., 68). The title passed for valuable consideration to a purchaser authorized to hold the property. Aside from the corporate form of the transaction, the effect, too, was that each stockholder in one of the Railway Companies transferred an interest in his holdings to every other such stockholder.

These transactions being lawful are not affected by allegations as to the motive which actuated them. As the means employed were lawful, the only question must be whether the result accomplished was unlawful (*Pettibone vs. U. S.*, 148 U. S., 197, 203). In *United States vs. Isham* (17 Wall., 496), it was claimed that the defendant had adopted a certain course for the purpose of avoiding a statute imposing a tax, but the court held that this was of no importance, and that the defendant was acting entirely within his rights, if the device was carried out by legal forms. This was in accordance with elementary rules.

> "An act legal in itself, and violating no right, cannot be "made actionable on account of the motive which superin- "duced it" (*Adler vs. Fenton*, 24 How., 407, 410).
>
> "The exercise of a legal right cannot be affected by the "motive which controls it" (*Kiff vs. Youmans*, 86 N. Y., 324, 329; cited with approval in *Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 540, 546).
>
> "No action can be maintained against one on account of "the exercise of a legal right, whatever the motive that dic- "tated such exercise" (*Randall vs. Hazleton*, 12 Allen, 412, 418).
>
> To the same effect are *Dickerman vs. Northern Trust Co.*, 176 U. S., 181, 190; *Strait vs. National Harrow Co.*, 51 Fed. Rep., 819; *Phelps vs. Nowlen*, 72 N. Y., 39, 45; *Wood vs. Amory*, 105 N. Y., 278, 281; *Lough vs. Outerbridge*, 143 N. Y., 271, 282; *National Assn. vs. Cumming*, 170 N. Y., 315, 326, 340; *Mogul Steamship Co. vs. McGregor*, App. Cas., 1892, pp. 25, 41, 42; *Allen vs. Flood*, L. R., App. Cas., 1898, p. 1; *Pender vs. Lushington*, L. R., 6 Chancery Div., 70, 75.

All the action had being authorized by law, the motive thereto clearly is unimportant. But, as hereafter considered an intent to violate the anti-trust act, and therefore to commit a crime, could not in any case be inferred, but must be actually proved.

SECOND.

No indirect or remote effect of these lawful transactions upon competition between the Railway Companies, could bring them within the Federal anti-trust act.

The proofs show that they have had no such effect.

Aside from this, they are not within the anti-trust act of July 2, 1890, which provides that "every contract, combination in the "form of trust or otherwise, or conspiracy in restraint of trade or "commerce among the several states or with foreign nations, is "hereby declared to be illegal" (26 U. S. Stat., p. 209, ch. 647).

The present effort is to annul action authorized expressly by the statutes of New Jersey, upon the ground that it is contrary to this Federal statute as constituting a restraint of interstate commerce. Obviously it must be established beyond doubt that the case comes within the description of the Federal statute in order to warrant thus overriding the statutes of New Jersey. The claim is based upon the ground, not that in themselves the transactions constitute a restraint of interstate commerce, but that their effect will be to enable the Securities Companies to restrain interstate commerce, should it see fit to do so. In other words, the transactions pleaded consist of nothing but the sale and the purchase of the stock of the Railway Companies—which have not the remotest connection with interstate commerce. Any possible restraint of interstate commerce is placed by the petition itself not upon the transactions which have actually taken place, but upon the claim that they put the purchaser in such a position that in the future it may restrain interstate commerce. It needs no argument to show that the claim rests not upon what has been done, but upon the possible future result of that which has been done. But, in order to come within the statute, the subject matter must be interstate commerce, and the restraint thereof must be directly and immediately accomplished by the provisions of the contract, and not be merely its indirect, remote or possible effect. It is obvious that the present case does not meet either requirement.

The subject matter was the shares of the Railway Companies and the transaction was the purchase and sale of such shares. The fact

that the purchaser of the shares might be in a position to take action affecting interstate commerce did not establish that in itself the subject matter was interstate commerce. The transaction here was outside of interstate commerce even more clearly than that, which in *U. S. vs. E. C. Knight Co.* (156 U. S., 1.), was recognized as not prohibited by the statute. There the question was in regard to the union under one control of a number of manufacturing establishments, of which in the usual course of business the product was shipped out of the state, thus becoming part of the interstate commerce. It was held that, although these manufactories were carrying on an interstate business, the question of their union was a matter not coming within the Federal statute. The court said that contracts connected with manufacturing "to raise or lower prices or wages, "might unquestionably tend to restrain external as well as "domestic trade; but the restraint would be an indirect result, "however inevitable and whatever its extent, and such result would "not necessarily determine the object of the contract, combination "or conspiracy" (p. 16), and that Congress did not attempt by the statute "to limit and restrict the rights of corporations "created by the states or the citizens of the states in the acquisi- "tion, control or disposition of property" (p. 16). So, too, *Hopkins vs. United States*, 171 U. S., 578, there was an exchange, of which the members dealt in live stock largely shipped from other states, and the exchange had numerous regulations, of which the effect would be to diminish competition among the members. It was held that the subject matter was not interstate commerce, but was the dealings with the cattle after they had reached their destination, and therefore that the effect on interstate commerce was merely indirect. The Court said "an agreement may in a variety "of ways affect interstate commerce, just as state legislation may, "and yet, like it, be entirely valid, because the interference produced "by the agreement or by the legislation is not direct" (p. 594).

It is equally clear that the purchase and sale of the stock of these Railway Companies is not a matter of interstate commerce merely because the companies carry on an interstate business.

It is well settled that the mere fact that a contract has the effect of restraining trade or suppressing competition in some degree does not render it injurious to the public welfare and thus bring it within the police power (*Oregon Co. vs. Winsor*, 20 Wall., 64; *Gibbs vs. Gas Co.*, 130 U. S., 396; *Hyer vs. Richmond Co.*, 168 U. S.,

471, 477, affg., 80 Fed. Rep., 839; *Continental Ins. Co. vs. Board*, 67 Fed., 310; *Diamond Match Co. vs. Roeber*, 106 N. Y., 473; *Hodge vs. Sloan*, 107 N.Y., 244; *Leslie vs. Lorillard*, 110 N. Y., 519; *Tode vs. Gross*, 127 N. Y., 480; *Matthews vs. Associated Press*, 136 N. Y., 333; *Lough vs. Outerbridge*, 143 N. Y., 271, 145 N. Y., 601; *Oakes vs. Cattaraugus Co.*, 143 N. Y., 430; *Curran vs. Galen*, 152 N. Y., 33, 36; *Watertown Co. vs. Pool*, 51 Hun, 157, affd. 127 N. Y., 485; *Central Shade Roller Co. vs. Cushman*, 143 Mass., 353).

Under the decisions of this Court in the cases of *U. S. vs. E. C. Knight Co.* (156 U. S., 1), *Hopkins vs. U. S.* (171 U. S., 578), *Anderson vs. U. S.* (171 U. S., 604), and *Addyston Pipe & Steel Co. vs. U. S.* (175 U. S., 211, 246), the Anti-Trust Act concerns only those agreements of which the direct and immediate effect is to restrain commerce. The transaction now under review was lawful, and, however considered, was not prohibited by the Anti-Trust Act, because such restraint upon interstate trade or commerce, if any, as it might impose, would be indirect, collateral and remote.

The effect of the decisions in the cited cases (already abundantly and sufficiently discussed in detail by other counsel) was fully recognized by the learned Court below, but declared to be irrelevant to the present transaction, because, in the opinion of the Court, the present transaction directly and immediately affected interstate commerce.

This conclusion of the Court rests upon the postulate that in this transaction

> " *the object and necessary effect* is to give to a single person
> " or to a coterie of persons full control of all the means of
> " transportation owned by two competing and parallel lines
> " of road engaged in interstate commerce, as well as the
> " power to fix the rate for the transportation of persons and
> " property."

If the " *necessary* effect " of the transaction be to affect interstate commerce, then all argument is at an end, for such " necessary effect " must have shown itself concretely. But neither in fact or in proof is there any such concrete effect. Therefore, we must examine the postulate somewhat critically to ascertain its exact meaning and to demonstrate what to us seems to be its unsoundness.

For its validity, in the present case, the postulate involves two propositions of which as we think neither can be maintained:

FIRST, That though in and of itself a transaction, does not directly and immediately affect interstate commerce, *such an unlawful object and necessary effect may be imputed to the transaction;* and, SECOND, that such unlawful object and necessary effect is to be imputed to a transaction which gives to a single person or to a coterie of persons full control of two competing lines, with the power to fix the rate for transportation thereon, even though there be no act of control and no exercise of the power; and no agreement either to exercise, or to refrain from exercising, such power or such control.

As to these two propositions, it may be respectfully observed:

FIRST. The defendants undertook by proof to establish, as matter of fact, they were acting for a sufficient and lawful purpose not condemned by the anti-trust act; but all proof tending in this direction was deemed wholly immaterial by the Court below, which said:

> "It may be that the motives which inspired the combi-
> "nation are unselfish; that the combination was formed
> "by the individual defendants to protect great interests
> "which had been committed to their charge; or it may be
> "that the combination was the initial and a necessary
> "step in the accomplishment of great designs, which, if
> "carried out as they were conceived, would prove to be of in-
> "estimable value to the communities which these roads serve
> "and to the country at large. We shall neither affirm nor
> "deny either of these propositions, because they present
> "issues which we are not called upon to determine, and some
> "of them are issues which no court is empowered to decide,
> "involving, as they do, questions of public policy which
> "Congress must determine."

All evidence as to the actual and controlling motive and purpose of the defendants being disregarded, the Court proceeded next to invoke "the familiar rule that everyone is presumed to intend what "is the *necessary* consequence of his own acts when done wilfully "and deliberately."

Thus invoked as appropriate and sufficient for the disposition of the present case, this "familiar rule" implies that the original transaction, the purchase of the railway stocks, was followed by some concrete violation of the Sherman Law, made possible by reason of such purchase.

Unless, as matter of fact, some such subsequent violation of the law did result, none can now be imagined as a consequence, certainly not as a "*necessary* consequence," of the original transaction. But, indisputably in this case, there has been no subsequent act in anywise affecting interstate commerce, and no consequential basis from which to infer an illegal purpose in any antecedent act. The "familiar rule," therefore, is inapplicable, and the validity of the original transaction must be determined by consideration solely of its own elements.

It is never to be forgotten that this act "*is a criminal statute* "*pure and simple*" and that its meaning and effect as now determined must also be its meaning and effect when made the basis of a criminal proceeding. Conversely, the act should now receive such construction only as it would receive upon the trial of those indicted for violating its provision. In such case it is the established rule (*People vs. Wiman*, 148 N. Y., 29–33) that "criminal intent is "essential to constitute a crime, and the testimony bearing thereon "is always a question for the jury." It is improper, merely as matter of law, *to infer* the existence of an intent to violate this criminal statute from the mere doing of an act in itself not contravening the statute and not followed by any consequent violation of the statute. "However clear the proof may be or however in- "controvertible may seem to the Judge to be the inference of a "criminal intention, the question of intent can never be ruled as a "question of law, but must always be submitted to the jury" (*People vs. Flack*, 125 N. Y., 324, 334–336).

In the present case, all evidence as to the facts having been disregarded, it would seem to follow that it was permissible to entertain the following, and only the following presumptions as to the object of the transaction: *(a)* The primary object was to promote the several pecuniary interests of the parties to the transaction through the purchase of corporate stocks, including those of the two railway companies; and *(b)* the promotion of such pecuniary interests was to be effected lawfully, for as we have seen, the possibility of a controlling lawful purpose has not been excluded or even challenged by proof of any actual condition or any actual consequence of the original transaction, which in and of itself was lawful.

SECOND. The actual conditions being thus lawful, it became vitally necessary for the Circuit Court to establish the second proposition above stated and in its opinion often repeated in many

different forms, of which one may be quoted, viz., that the object and *necessary* effect of a transaction is unlawfully to affect interstate commerce if the transaction gives

> " to a single corporate entity, or more accurately, to a few " men acting in concert and in its name and under cover of " its charter *the power to control* all the means of transporta- " tion that are owned by two competing and parallel rail- " roads engaged in interstate commerce," etc., etc.

That the Court had in mind the mere possession of power, and not any concrete act in exercise of that power (for none was proved), is made clear by its subsequent statement that

> " the power was not only acquired by the combination, but it " is effectually exercised, and it operates directly on interstate " commerce, *notwithstanding the manner of its exercise, by* " *controlling the means of transportation*, to wit, the cars, " engines and railroads, by which persons and commodities " are carried, *as well as by fixing the price* to be charged for " such carriage." *(Note:* There was no proof that any rate had actually been so fixed or altered.)

That such acts might be those not of the organizers, but only of executive agents of the several railway companies, whom it was said that they might control (though it was not proved that they did control them), was deemed immaterial by the Court which said :

> " It matters not, we think, through how many hands the " orders come by which these aims are accomplished or " through what channels."

In thus ruling, the Court accepted the propositions upon page 30 of the brief below of the counsel for the United States, which may well be quoted here :

> " (B) Under this Act it is only necessary to show that " the defendants have acquired the **power** to monopolize or " restrain trade.
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> * * * * * * *
>
> " I want to make this point as clear and decided as I can, " because in my judgment this is one of the controlling posi- " tions in the case. If your Honors will allow me to say so, " I don't have the slightest doubt as to its correctness. And " that point is this: It is *a question of the possession of the* " *power*, and not a question of the *exercise of the power to* " *monopolize*, and no *overt* act in the exercise of the power " that the monopoly gives need be shown. In fact, in nearly " all these cases there was no overt act at all. Let me state " it again, so your Honors will get my thought: to create a

> " monopoly or an attempt to monopolize or a conspiring to
> " monopolize, it is not necessary to show that the person or
> " corporation that monopolized or attempted to monopolize
> " or combined to monopolize ever exercised the *power* that
> " was gained. The offense which the law forbids **is the**
> " **obtaining of the power.**"

The theory upon which this suit was prosecuted and decided is thus clearly disclosed.

Regardless of all other considerations presented on this argument, the judgment under review must be reversed unless it is to be established *as matter of law* that the mere possession of the power to control all the means of transportation of two competing interstate commerce carriers operates as the effectual exercise of such power and directly affects interstate commerce, notwithstanding the fact that such power has never been exercised by its possessors, and the further fact that it is perfectly practicable for them to exercise it in a perfectly proper way.

Support for the proposition now under review was sought below in the *Pearsall* case (161 U. S., 674), the *Joint Traffic* case, the *Trans-Missouri* case and the *Addyston Pipe* case. The proposition, however, can be deduced from these cases only by what to us seems violent distortion.

In the *Pearsall* case the opinion expressly recognizes the right of the stockholders of either company, by individual purchases, lawfully to acquire a majority, or even the whole, of the stock of the other company, and thus possibly obtain its ultimate control—the companies, however, still remaining separate corporations, with no interests as such in common. Therefore, instead of affirming, the opinion expressly denied, that the mere, ownership of the stocks of two competing corporations would constitute a legal offense. This effect of the opinion was recognized, and vigorously and justly expounded, by Judge LOCHREN, in the case of *Minnesota vs. Northern Securities Co.* (123 Fed. Rep., 692-705).

No one of the other three cases cited by counsel for the Government in support of this extraordinary proposition has any just relation to the question of stock ownership. In each of the cases there was an express agreement manifestly intended to operate and actively operating in immediate and direct violation of the Anti-Trust Act.

A doctrine so momentous and far-reaching as this is not to be spelled out from the incidental reasoning in any judicial opinion, but must be found in some clear, direct and unmistakable adjudication before this Court shall be bound by any rule of *stare decisis*.

Mr. Thorndike, in his admirable and cogent review of "The decision in the 'Merger Case'" (Boston, 1903), points out that the decision itself shows that the three cited cases cannot be invoked in support of this doctrine (p. 5):

> "These are the decisions referred to by the Circuit Court, "but, while they establish that a contract between two or "more rival companies regulating their rates or prices is a "violation of the act, they contain no suggestion that a single "person, or two or more persons jointly, may not own con- "trolling interests in rival enterprises and exercise the con- "trol that arises from their ownership. Applying to the "case before the Circuit Court the language used by that "court itself in stating the effect of the decisions of the "Supreme Court *(b)*, there was no *agreement* between the "two companies *which required them to act in concert* in fix- "ing the rate for the carriage of passengers or freight over "their respective lines, or which *restricted the right* of either "of them to charge such rates as it might please. The case "is consequently not within the effect of the decisions as so "stated *(c)*"

Of course, nothing that was said in the opinion of Judge FINCH in the New York Court of Appeals in the *Sugar Refining* case has any real relation to this question, for there the Court decided only that corporations had no power to enter into a partnership.

It is not too much to say that outside of the present case, no decision can be found directly holding the extraordinary proposition that "the offense which the law forbids is the obtaining of the power" to do an act, and that it is not necessary to show any overt act in the exercise of that power.

(c) "In the other cases under the act previously decided by the Circuit Court "and Court of Appeals, as in the three cases decided by the Supreme Court, the "combinations had been formed by corporations or individuals engaged in busi- "ness independently of one another and they had agreed to regulate their prices or "mode of carrying on their business by the rules of the combination, *e. g.*, *U. S.* "*v. Jellico Coal Co.*, 46 Fed. R., 432; *U. S. v. California Coal Dealers Association*, "85 Fed. R., 252; *Chesapeake Fuel Co. v. U. S.*, 115 Fed. R., 610; *Gibbs v. Mc-* "*Neeler*, 118 Fed. R., 120."

We cannot fail to feel the sense of injustice that led to the vigorous disclaimer of Judge LOCHREN in the *Minnesota* case (123 Fed. Rep., 692–702):

> "*I am compelled to reject the doctrine that any person can "be held to have committed, or to be purposing and about to "commit, a highly penal offense, merely because it can be "shown that his pecuniary interests will be thereby advanced, "and that he has the power, either directly by himself or indi-"rectly through persuasion or coercion of his agents, to compass "the commission of the offense,*"

Nothing less than an adjudication in this Court necessarily and directly involving this doctrine can command its general acceptance.

When reduced to its simplest form, the proposition seems to us not unlike a statement that the mere possession of the innocent means or power to commit a crime may be equivalent under certain conditions to the very commission of the crime itself. But it is difficult to believe that the learned author of the opinion now under review, justly and equally distinguished for his ability and his acumen, can have had any such idea. It is more natural to assume that in his expressions he was constrained by his spirit of loyal deference to what he felt to be the effect of the judgment of this Court overruling his learned colleague, Judge SANBORN and himself in the *Trans-Missouri Freight* case (58 Fed. Rep., 58; 166 U. S., 288), though, as it seems to us, he has disregarded the very wholesome limitations stated in that judgment of this Court.

However, be that as it may, the limitations prescribed by this Court in the cited cases preclude the possibility of its acceptance of these propositions, however construed, of the opinion of the Circuit Court.

If the mere possession of power to do an act affecting interstate commerce, in and of itself, and without any actual exercise of such power by its possessors, constitutes directly and immediately a restraint of such commerce, then the words "direct and immediate," used again and again by this Court in the cited decisions, are stripped of their legitimate meaning. The terms lose their accustomed significance, if it can be maintained that the mere possession of absolute power to control all the means of transportation of two competing interstate commerce carriers, directly and immediately constitutes an act of control. Be-

tween such possession of power and any act in exercise thereof, something must intervene, at least a further volition, which, if involving more than one person, may be the combination or conspiracy prohibited by the statute. The necessity of such intervening volition and of action pursuant thereto demonstrates that the exercise of the power is not an *immediate* consequence of its possession. Again, such intervening act or volition may tend towards a perfectly lawful end and, therefore, the mere possession of the power does not of necessity involve a violation of the statute.

In fine, the fundamental proposition of the decision now under review can be maintained only by rejecting the repeated and familiar determination of this Court that the Anti-Trust Statute of 1890 prohibits only those acts and agreements which directly and immediately restrain inter-state commerce.

> " The contract condemned by the statute is one whose
> " direct and immediate effect is a restraint upon that kind of
> " trade and commerce which is inter-state * * *. There
> " must be some direct and immediate effect upon inter-state
> " commerce to come within the act. * * * A tax is not
> " one upon inter-state commerce because it affects it only
> " incidentally and remotely, *although certainly*" (*Hopkins v.*
> " *U. S.*, 171 U. S., 578–592).

These decisions of this Court must be controlling for the additional reason that they define the extent to which contracts in restraint of trade may be prohibited without infringing upon the constitutional guaranties of liberty and property.

It has been held repeatedly that such restraints as result from the sale or the purchase of property are not within the provisions of anti-trust statutes. Indeed, it is the settled law that the transfer of a business is not illegal because it restrains trade, even by an express covenant (*Oregon Co. vs. Winsor*, 20 Wall., 64; *Union Co. vs. Connolly*, 99 Fed. Rep., 354, affd. 184 U. S., 540; *Fisheries Co. vs. Lennen*, 116 Fed., 217; *Harrison vs. Glucose Co.*, 116 Fed., 304; *Hodge vs. Sloan*, 107 N. Y., 244; *Leslie vs. Lorillard*, 110 N. Y., 519; *Tode vs. Gross*, 127 N. Y., 480; *Oakes vs. Cattaraugus Co.*, 143 N. Y., 430; *Watertown Co. vs. Pool*, 51 Hun, 157, approved 127 N. Y., 485; *Wood vs. Whitehead Co.*, 165 N. Y., 545; *Walsh vs. Dwight*, 40 App. Div., 513; *Park & Sons Co. vs. Druggists' Association*, 54 App. Div., 223; s. c., 175 N. Y., 1). As was said in *Diamond Match Co. vs. Roeber*, 106 N. Y., 473, " we suppose a party

" may legally purchase the trade and business of another for the " very purpose of preventing competition, and the validity of the " contract, if supported by a consideration, will depend upon its rea- " sonableness as between the parties " (p. 483).

So, too, it has been ruled precisely that the formation of associations or corporations is not illegal, because the result will be to restrain competition.

In *Hopkins vs. U. S.*, 171 U. S., 578, and *Anderson vs. U. S.*, 171 U. S., 604, the associations in various ways restricted competition among their own members and prohibited dealing with non-members. These were recognized as being legitimate purposes of association.

In *U. S. Vinegar Co. vs. Foehrenbach*, 148 N. Y., 58, it was held that the formation of a corporation was not unlawful, although the prevention of competition between its members was a purpose of the organizers; and the same thing was held in *Matthews vs. Associated Press*, 136 N. Y., 333, for reasons stated in the opinion of the Court by Judge PECKHAM: and also in *Central Shade Roller Co. vs. Cushman*, 143 Mass., 353.

In *Rafferty vs. Buffalo City Gas Co.*, 37 App. Div., 618, the contract was by one corporation to purchase the stock and bonds of a company owning a franchise, which, if operated adversely to or in rivalry with the former company, might be ruinous to its business, and to pay therefor with stock and bonds issued by it. It was contended that this was illegal, as it would create a monopoly or an unlawful restraint of trade under the provisions of Section 7 of the Stock Corporation Law of New York prohibiting monopolies and restraints of trade. The court (PATTERSON, J.) said: "A monop- " oly is not constituted. No exclusive privilege or right as " against individuals or corporations to manufacture and sell " and distribute gas is acquired. Nor, in a more restricted " use of the word 'monopoly,' is that condition brought " about by force of this contract " (p. 622). To the objection that the contract was bad as preventing competition, the court said that a contract made to prevent or avoid competition was not necessarily invalid, and repeated with approval the rule laid down in *Diamond Match Co. vs. Roeber* as quoted above, as follows: "We suppose a party " may legally purchase the trade and business of another for " the very purpose of preventing competition, and the val- " idity of the contract, if supported by a consideration, will " depend upon its reasonableness as between the parties " (p. 623). The court, therefore, held that this contract by one corporation to acquire the stock and bonds of a competing corporation was not illegal (see also remarks of PECKHAM, J., in *Gamble vs. Queens County Water Co.*, 123 N. Y., 91–104).

In re Greene, 52 Fed. Rep., 104, the facts were that a corporation had acquired the plants of seventy others engaged in the same line of business and controlling seventy-five per cent. of the product. It was claimed that this constituted a monopoly. The court said (JACKSON, C. J.): "All persons, "individually or in corporate organizations, carrying on "business avocations and enterprises involving the purchase, "sale or exchange of articles or the production and manu- "facture of commodities, which form the subjects of commerce, "will, in a popular sense, monopolize both state and inter- "state traffic in such articles or commodities just in proportion "as the owner's business is increased, enlarged and developed. "But the magnitude of a party's business, production, or "manufacture, with the incidental and indirect powers "thereby acquired, and with the purpose of regulating prices "and controlling interstate traffic in the articles or com- "modities forming the subject of such business, production, "or manufacture, is not the monopoly or attempt to monop- "olize which the statute condemns (p. 115). * * It was "certainly not a 'monopoly' in the legal sense of the term, "* * * to own 70 distilleries and the products thereof, "whether such products amounted to the whole or a large "part of what was produced in the country. Their ownership "and control of such products as subjects of trade and com- "merce, is not what the statute condemns, but the monopoly "or attempt to monopolize the interstate trade or commerce "therein. In this acquisition and operation of the 70 dis- "tilleries which enabled the accused or (his) company to "manufacture and control the sale of 75 per cent. of the "distillery products of the country, it does not appear, nor "is it alleged, that the persons from whom said distilleries "were acquired were placed under any restraint by contract "or otherwise, which prevented them from continuing or "re-engaging in such business. All other persons who "chose to engage therein were at liberty to do so. The "effort to control the production and manufacture of dis- "tillery products by the enlargement and extension of busi- "ness, was not an attempt to monopolize trade and com- "merce in such products within the meaning of the statute" (p. 116).

The same thing was held in *United States vs. Greenhut*, 51 Fed. Rep., 205, 211, the court saying:

"If these acts are illegal and in restraint of trade, and if "they constitute a monopoly under this act, it may well "be denominated an act to restrain legitimate enterprise, "and to limit and qualify the ownership in property" (p. 211). This opinion was fully approved *In re Terrell*, 51 Fed. Rep., 213.

In *Trenton Potteries Co. vs. Oliphant*, 58 N. J. Eq., 507, the rule was carried much further than the present facts. The Court held that, "although contracts to restrain and "limit competition in the production of some commodity, in "the manufacture and sale of which the public have an in- "terest, are repugnant to public policy, a restraint or limit "upon competition may result from contracts which the "courts are bound to enforce. Thus, in the absence of legis- "lative prohibition, if such could be imposed, courts would "be obliged to recognize and enforce contracts for the pur- "chase by an individual manufacturer of the business of his "competitors, even to the last one, although such purchases "tend to eliminate competition, and the last purchase would "completely exclude it, at least for a time.

"Under our liberal corporation laws, corporations may "be formed to engage in and carry on almost every con- "ceivable manufacture or trade. They are empowered to "acquire property and the control of other corporations. "Acts which corporations do under these broad legislative "grants cannot be pronounced by the courts to be repugnant "to public policy. The legislative grants of power fix the "character and limit of public policy in that regard. A cor- "poration thus empowered to engage in and carry on a cer- "tain manufacture may buy the business of its competitors, "and courts cannot pronounce contracts for such permitted "purchases invalid, although they tend to produce, and may "temporarily produce, a monopoly of such manufacture."

In the well-known case of *Mogul Steamship Co. vs. McGregor*, App. Cases, 1892, page 25, it was held that an association which was lawful in its character was not rendered unlawful by the fact that it was of such size as to enable it to control the greater part of the business. The court said: "But in this case the thing done, the trading by a number of "persons together, effects no more and is no more, so to "speak, a combined operation than that of a single person. "If the thing done is rendered unlawful by combination, the "course of trade by a person who singly trades for his own "benefit and apart from partnership or sharing profits with "others, but nevertheless avails himself of combined action, "would be open to the same objections. The merchant who "buys for him, the agent who procures orders for him, the "captain who sails his ship, and even the sailors (if they "might be supposed to have knowledge of the transaction) "would be acting in combination for the general result, and "would, whether for the benefit of the individual, or for an "associated body of traders, make it not the less combined "action than if the combination were to share profits with "independent traders; and if a combination to effect that "object would be unlawful, the sharers in the combined

" action could, in a charge of criminal conspiracy, make no " defense that they were captain, agent or sailors, respect- " ively, if they were knowingly rendering their aid to what, " by the hypothesis, would be unlawful if done in combi- " nation " (pp. 38, 39). * * * " What one trader may do " in respect of competition, a body or set of traders can law- " fully do; otherwise a large capitalist could do what a " number of small capitalists, combining together, could not " do, and thus a blow would be struck at the very principle " of co-operation and joint stock enterprise. I entertain no " doubt that a body of traders, whose motive object is to " promote their own trade, can combine to acquire and " thereby in so far to injure the trade of competitors, pro- " vided they do no more than is incident to such motive " object, and use no unlawful means " (p. 50). This case was approved in *Lough vs. Outerbridge*, 143 N. Y., 283. See also, the very recent case of *State vs. Continental Tobacco Co.* (Mo. Sup. Ct.), 75 S. W. Rep., 737.

If the result of restricting competition should follow from the lawful transactions involved herein, it would be not their direct result but only an incidental and collateral result, such as must always follow when business interests of a similar character pass into the same ownership. It would be precisely such a result as those recognized as lawful by the Court in *U. S. vs. Joint Traffic Association* (171 U. S., 505). In reply to the suggestion that, as construed in the Trans-Missouri case, the act would apply to the "*formation of a corporation to carry on any par-* " *ticular line of business by those already engaged therein; a con-* " *tract of partnership or of employment between two persons pre-* " *viously engaged in the same line of business*" (p. 567); the Court said that the "*formation of corporations for business or manufactur-* " *ing purposes has never, to our knowledge, been regarded in the* " *nature of a contract in restraint of trade or commerce. The same* " *may be said of the contract of partnership*" (p. 567).

Therefore, no indirect or remote effect upon competition between the Railway Companies, could bring the transactions within either the first section or the second section of the Anti Trust Act.

As an indirect and remote result cannot bring the transaction within the prohibition of the first section of the act, as being an agreement in restraint of commerce, no more can it bring the transaction within the second section denouncing monopolies. Under the second section as under the first, the forbidden result must be direct and immediate.

But, it has been denied and it is very doubtful whether in any case the second section of the act applies to railroads.

Professor LANGDELL concludes his admirable discussion of this point as follows:

> "As, therefore, the only thing that a railway company "can monopolize is the carriage of goods and passengers "for hire, and as such carriage does not constitute trade or "commerce, it follows that railway companies are not within "section 2 of the Act. The only monopoly which section 2 "forbids is a monopoly of the goods which constitute the "subjects of trade and commerce, so far as the trade and "commerce in such goods is subject to the control of the "United States. This explains the fact that section 2 forbids "the monopoly of any part of such trade or commerce. To "forbid a monopoly by a railway company of the carriage "of any part of the goods carried by it would be absurd, as "every railway company necessarily has a monopoly of the "carriage of by far the greater part of the goods carried by "it, and no railway company could live without such "monopoly. It is only at what are known as competing "points that a 'shipper' of goods has any choice as to the "railway by which he shall 'ship' them."
>
> 16 Harvard Law Review, 545, June, 1903.

MR. THORNDIKE says ("Merger Case," pp. 32, 33):

> "But even if it were established that a combination for "the purpose of acquiring all the trade of a particular kind "in the country might be a monopoly, that would be very "far from establishing the proposition that the acquisition "of a controlling interest in two competing railway com- "panies by a single person or corporation, or even the con- "solidation of such railway companies into one company, "would be a monopoly. If one of them by itself was not a "monopoly, the two combined into one would not be. A "single company might originally have constructed and "owned both railways. The consolidation of the two com- "panies would have the same effect as if this had been done. "The combination would not prevent other people from "owning or building other railways. In the case of the "Northern Pacific and Great Northern railways, the only "ground for claiming that there is a monopoly is that they "have been competitors and that the effect of the control "acquired would be to extinguish the competition. But it is "not pretended that it would interfere with the competi- "tion of other existing railways or of others that may be "built. If it could be made out that the two companies "have been consolidated into one, it would be only one

> " of hundreds of cases in which two rivals in trade have " united. There is no authority for saying that such a " union would constitute a monopoly or be contrary to any " rule of law."

In this statement Mr. Thorndike cannot have overlooked the statements of Mr. Justice BROWN in the PEARSALL case upon which in the Circuit Court the counsel for the United States relied as establishing this point in their favor. What did or did not constitute a monopoly was not involved in that case. The one question there presented and decided, was whether an unexercised corporate right was so vested as to be beyond the power of subsequent legislative repeal, by a statute forbidding not monopolies, but the consolidation of parallel and competing railroads. Had there been no State statute forbidding such consolidations, or if the acquisition of the stock of one company had in no wise involved its corporate absorption by the other company the transaction would have been legitimate.

> " Doubtless these stockholders could lawfully acquire " by individual purchases a majority or even the whole of the " stock of the reorganized company and thus possibly obtain " its ultimate control, *but the companies would still remain* " *separate corporations with no interests as such in common.*"

This language (at p. 671–2) must have been used by Mr. Justice BROWN intentionally and significantly. It has had vast significance for parties and counsel giving advice upon the faith thereof, and also for Courts below. In the *Minnesota* case (123 Fed. Rep., 692–705) Judge LOCHREN expresses the view generally taken by the bar :

> " I am not able to agree with the suggestion that this " expression may be regarded as one not necessary to the " decision, and therefore perhaps not carefully considered. " On the contrary, it seems to me to be a carefully considered " and necessary limitation or explanation of general language " elsewhere made use of in that decision. * * * The " two companies still remain separate corporations, with no " interests as such in common."

In the Joint Traffic cases the Court did not specifically define "monopoly," but said that it had the meaning given to it in the body of the Anti-Trust Act, which was not involved in the Pearsall case, and the decision there cannot now be urged upon this Court as a limitation upon its freedom of construction of the statute. As

Judge McCormick discreetly observed (*Laredo vs. International Bridge Co.*, 66 Fed. Rep., 246-8): "It has therefore generally been "deemed wise and safe to use rather a process of exclusion and de- "termine what is not a monopoly so far as the case in hand re- "quired."

Obviously, a consolidation of two railroads authorized by the laws of every State which they enter would not be condemned as constituting a monopoly; nor would a purchase of all the stock of one road by a competing road similarly authorized be so condemned; nor would a combination to induce the legislatures of the several States to authorize such a consolidation or such a purchase. It cannot be that, in prohibiting monopolies, the Congress intended to forbid these familiar processes of railroad amalgamation, and if, when authorized by State law, the consummated act is not a monopoly, it would not be such merely because it has not been not so authorized.

THIRD.

The construction claimed would make the statute unconstitutional because it would deprive the Securities Company of its property without due process of law.

It is, of course, well settled that corporations are entitled to the same constitutional protection of their property rights as natural persons. "Corporations can invoke the benefits of the provisions "of the constitution and laws which guarantee to persons the enjoy- "ment of property or afford to them the means for its protection, "or prohibit legislation injuriously affecting it" (*Minneapolis Railway Co. vs. Beckwith*, 129 U. S., 26, 28). "It is now settled that "corporations are persons within the meaning of the constitutional "provisions forbidding the deprivation of property without due "process of law, as well as a denial of the equal protection of the "laws" (*Covington Turnpike Co. vs. Sandford*, 164 U. S., 578, 592; *Gulf Co. vs. Ellis*, 165 U. S., 150, 154; *Lake Shore Co. vs. Smith*, 173 U. S., 684, 690). "The fifth amendment to the constitution

" declares that no person shall 'be deprived of life, liberty or prop-
" 'erty without due process of law.' This is a limitation upon the
" federal government similar to that which exists in the constitu-
" tion of several of the states against their own legislative bodies ;
" and the term 'person' thus used has always been held, either by
" tacit assent or express adjudication, whenever the question has
" arisen, to extend, so far as property is concerned, to corporations,
" because to protect them from spoliation is to protect the corpor-
" ators also" (*County of Santa Clara vs. Southern Pacific R. R. Co.*, 18 Fed. Rep., 385, 404 ; see, also, *County of San Mateo vs. Southern Pac. Co.*, 13 Fed. Rep., 722, 745, 760).

This constitutional provision protects the right to acquire property equally with the right to hold the same after it has been acquired. "As the possession of property of which a person cannot " be deprived doubtless implies that such property may be acquired, " it is safe to say that a state law which undertakes to deprive any " class of persons of the general power to acquire property would " also be obnoxious to the same provision" (securing due process of law). "Indeed, we may go a step further and say that, as prop-" erty can only be legally acquired as between living persons by " contract, a general prohibition against entering into contracts with " respects to property or having as their object the acquisition of " property would be equally invalid" (*Holden vs. Hardy*, 169 U. S., 366, 391 ; *State vs. Goodwill*, 33 W. Va., 179 ; *State vs. Julow*, 129 Mo., 163, 173). These rights are not affected by the statute now invoked. As the court said in *U. S. vs. E. C. Knight Co.*, 156 U. S., 1, 16, Congress did not attempt by the statute "to limit and " restrict the rights of corporations created by the states, or the " citizens of the states in the acquisition, control or disposition of " property."

The *Pearsall* case (161 U. S., 646), distinctly recognizes that a natural person would be entirely at liberty to buy all the shares which his means permitted of the stock of the Northern Pacific Railway Company and the Great Northern Railway Company. The state creating a corporation might limit its power in this respect, but Congress had no such general authority to cut down the powers granted by the states to their corporations, merely because they are artificial instead of natural persons. Therefore, it is obvious that a corporation having authority by its charter to make such purchases cannot, merely because it is a corporation, be prevented from so doing without depriving it of

that right without due process of law. It is a lawful artificial person having power to acquire this property and fully entitled to the constitutional protection. This has all the more force because the statute now invoked makes no distinction whatever between the rights of natural persons and artificial persons.

FOURTH.

As construed and applied by the Circuit Court the Anti-Trust Act is unconstitutional, in that it discriminates between persons in the matter of property rights and privileges on grounds that are purely arbitrary and are without justification in reason.

The vesting of the control or the ownership of two competing railroads in a single individual consummated in any other way would have all the effect for good or for ill that would result from such a vesting through a conspiracy or a combination. But, by the act and by the decision under review, condemnation is placed not upon a single ownership under all conditions, but only upon such single ownership when effected in a particular way; thus establishing a discrimination that is arbitrary, unreasonable and invalid.

1. That such a discrimination exists as the result of the Court's view of the statute is unquestionable. Thus—

(a) One person may acquire a majority of the shares of each of two competing interstate railroads without violating this act; for, as observed by Professor Langdell, "no person can contract "or combine, or conspire with himself."

But that which may be done by one man of adequate means can not reasonably be forbidden to several, simply because they must club their means in order to make them adequate.

Indeed the acquisition by one man might well be claimed to be more mischievous than when made by several, because of the greater secrecy as well as the greater efficiency of the one-man power.

Surely it is contrary to the general policy of the law to distinguish between the rich and the poor to the prejudice of the poor; to confer upon the large capitalist privileges which are withheld from small capitalists by denying to them the right to pool their resources.

It may be suggested that the Legislature, and not the Courts, determines questions of policy, and that if the Anti-trust Act forbids to several persons what it permits to one, Congress simply avails itself of the rule that numbers may make unlawful, and may justly make unlawful, that which when done by a single individual, is not unlawful.

But, though well settled, the rule necessarily is limited to cases in which of themselves numbers are a force—in which many, simply because they are many, do more and can do more, than it is possible for one to do.

The rule, however, does not apply where the capacity of several persons acting in concert can be no greater than that of one person similarly situated—where, to illustrate by the case at bar, as majority stockholders of two competing interstate railroad companies several persons have no greater power over them than would one man being a majority stockholder.

This criticism of the act, which is applicable generally and to all interstate commerce carriers, large or small, is not to be disregarded merely because in this case the acquisition of the two railroads would be beyond the power of one individual. The rule announced in this case would equally affect two ferries between Cincinnati and Covington, or two toll bridges crossing a boundary stream, which easily might be acquired and be operated by a single person.

(*b*) Besides thus discriminating between one person and several persons in the matter of their respective property rights, the Anti-trust Act as interpreted by the Court below in like manner arbitrarily discriminates between groups of persons.

If A, B and C, acting in concert, acquire a majority of the shares of two competing interstate railroads, the acquisition is unlawful.

But if D, E and F acquire the same majority by inheritance, by accident, by operation of law, in short in any way not involving concert of action for that purpose, the acquisition is lawful.

Yet of course D, E and F, have the same powers and interests as A, B and C, are subject to the same influences and temptations, and may use the acquired property to bring about the same public mischiefs.

There is absolutely no distinction between the two cases except A, B and C's concert of action in acquiring their property—a circumstance having no reasonable relation to the constitutional objects of the statute.

The power to suppress competition between two competing interstate railroad companies being always existent and under the theory of the Circuit Court always attaching to a majority of the shares of both, whether owned by one person or by several, the Anti-trust Act, if understood as intended to do away with such power, should be enforced so as to prevent any one person, as much as any two or more persons, from acquiring stock in both of such competing companies.

2. If as construed by the Court below, the Anti-trust Act, on the grounds above stated, arbitrarily and without reason discriminates between persons in the matter of their property, rights and privileges, the act is beyond the power of Congress as clearly as it would be beyond the power of any State Legislature.

The Fifth Amendment to the Federal Constitution secures all persons in their "liberty" and invalidates any legislation by Congress depriving them of "liberty" "without due process of law."

(a) As thus used, "liberty," means not merely bodily liberty—freedom from physical duress, but in effect comprehends substantially all those personal and civil rights of the citizen which it is meant to place be- yond the power of the general government to destroy or impair.

Mr. Justice SWAYNE:

> "Liberty is freedom from all restraints but such as are "justly imposed by law. Beyond that line lies the domain of "usurpation and tyranny. Property is everything which has "an exchangeable value and the right of property includes "the power to dispose of it according to the will of the "owner. Labor is property and as such merits protection."
> *Slaughter House Cases*, 16 Wall., 36, p. 127.

Mr. Justice BRADLEY:

> "In my view, a law which prohibits a large class of citi- "zens from adopting a lawful employment or from follow- "ing a lawful employment previously adopted does deprive "them of liberty, as well as property, without due process of "law. Their right of choice is a portion of their liberty; "their occupation is their property."
> 16 Wall., p. 122.

Mr. Justice FIELD:

> "By the term 'liberty' as used in the provision something "more is meant than mere freedom from physical restraint "or the bounds of a prison. It means freedom to go where "one may choose, and to act in such a manner, not incon- "sistent with the equal rights of others, as his judgment "may dictate for the promotion of his happiness; that is, to "pursue such callings and avocations as may be most suit- "able to develop his capacities, and give to them their "highest enjoyment." *Munn vs. Illinois* (94 U. S., 113, p. 142), cited with high appreciation by Judge PECKHAM (*People vs. Walsh*, 117 N. Y., 60).

The statement of a great English Judge may well be quoted in this connection:

> "The liberty of a man's mind and will to say how he "should (shall) bestow himself and his means, his talents, "and his industry, was (is) as much a subject of the law's "protection as was (is) that of the body."
>
> *Regina vs. Druitt*, 10 Cox C. C., 592, 600.

See among other authorities to the same point:

Butchers' Union Co. vs. Crescent Co., 111 U. S., 746.
Allgeyer vs. Louisiana, 165 U. S., 578.
United States vs. Joint Traffic Association, 171 U. S., 505, p. 572.
Addyston Pipe and Steel Co. vs. United States, 175 U. S., 211, pp. 228–9.
Bertholf vs. O'Reilly, 74 N. Y., 509.
In re Jacobs, 98 N. Y., 98.
People vs. Gillson, 109 N. Y., 389.
People vs. King, 110 N. Y., 418.
Godcharles vs. Wigeman, 113 Pa. St., 431.

(b) From the adjudications and principles made and affirmed in the cases above cited, it follows that, as used in the Fifth Constitutional Amendment, "liberty" includes equality of rights under the law and secures citizens similarly situated against discriminations between them which are arbitrary and without foundation in reason. Though perhaps unnecessary, it cannot be improper here to recall some of the notable affirmations of the doctrine by this Court.

Thus, in *United States vs. Cruikshank*, 92 U. S., 542, p. 554–555, after explaining the scope of that clause of the Fourteenth Amendment, preventing a State from depriving any person of life, liberty or property without due process of law, Chief-Justice WAITE com-

ments upon the next clause securing the equal protection of the laws in the following terms:

> "This provision does not, any more than the one which "precedes it, * * * add anything to the rights which "one citizen has under the Constitution against another. "The equality of the rights of citizens is a principle of "republicanism. Every republican government is in duty "bound to protect all its citizens in the enjoyment of this "principle, if within its power. That duty was originally "assumed by the States, and it still remains there. The "only obligation resting upon the United States is to see "that the States do not deny the right. This the amend- "ment guarantees, but no more."

Mr. Justice MATTHEWS:

> "When we consider the nature and the theory of our "institutions of government, the principles upon which they "are supposed to rest, and review the history of their de- "velopment, we are constrained to conclude that they do not "mean to leave room for the play and action of purely per- "sonal and arbitrary power."
>
> *Yick Wo vs. Hopkins*, 118 U. S., 356, p. 369.

Mr. Justice BREWER:

> "No duty rests more imperatively upon the courts than "the enforcement of those constitutional provisions intended "to secure that equality of rights which is the foundation of "free government."
>
> *Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis*, 165 U. S., 150, p. 160.

(c) Hence, the principles affirmed and acted upon by this Court in applying the Fourteenth Amendment to State legislation, are equally applicable to legislation by Congress, and, as construed by the Court below, the Anti-trust Act is invalid as trespassing upon the "liberty" of citizens, by denying them equality of rights and discriminating between them in the matter of their property rights, arbitrarily and without reason.

Thus—to refer only to some of the latest and most important adjudications—this Court has held invalid statutes—

> Singling out railroad companies and requiring them to pay attorneys' fees to successful adverse litigants.
>
> *Gulf, Col. & S. F. Ry. Co. v. Ellis, supra.*

> Singling out a single stock yard company—under pretense of classification—for reduction of charges.
>
> *Cotting v. Kansas City Co.*, 183 U. S., 79.

Permitting two or more live-stock raisers to combine to prevent competition, while making it criminal for two or more persons holding property for sale or exchange to combine for the same purpose.

Connolly v. Union Sewer Co., 184 U. S., 540.

In these cases, the State law attempted to make classification of persons; in the *first* case between railroad companies on the one hand and all other corporations and persons on the other; in the *second* case between the largest and wealthiest stock yard company of the State, and all other stock yard companies, and in the *third* case between some persons engaged in domestic trade or commerce and other persons also so engaged. In each case the Court held in substance that the classification was without justifiable basis, declaring

"But arbitrary selection can never be justified by calling "it classification" (165 U. S., p. 159).

"Classification can not be made arbitrarily. * * * "That must always rest upon some difference which bears a "reasonable and just relation to the act in respect to which "the classification is proposed and can never be made arbi- "trarily and without any such basis." * * *

"The differences which will support class legislation "must be such as in the nature of things furnish a reason- "able basis for separate laws and regulations" (165 U. S., p. 155).

"* * * In all cases it must appear, not only that a "classification has been made, but also that it is one based "upon some reasonable ground—some difference which "bears a just and proper relation to the attempted classifica- "tion—and is not a mere arbitrary selection" (165 U. S., p. 165).

"The Fourteenth amendment, in declaring that no state "'shall deprive any person of life, liberty or property, without "due process of law, nor deny to any person within its juris- "diction the equal protection of the laws, undoubtedly in- "tended not only that there should be no arbitrary deprivation "of life, or liberty, or arbitrary spoliation of property, but "that equal protection and security should be given to all "under like circumstances in the enjoyment of their personal "and civil rights; that all persons should be equally entitled "to pursue their happiness and acquire and enjoy prop- "erty." * * *

Barbier vs. Connolly, 113 U. S., 27, p. 31, cited in the opinion in *Cotting vs. Kansas City Stock Yards Co.*, 183 U. S., p. 106.

In view of the discriminations in the act as construed in the Circuit Court, is it not plain that the principles affirmed by this Court and applied in the cases above cited, require the act so construed to be held unconstitutional?

As so construed, the act undertakes to classify the persons who may, and the persons who may not, legally acquire a majority of the shares of two competing interstate railroads. On the one hand is the class which may acquire such majority, and which consists of any one person or of any two or more persons who get the same by inheritance, by operation of law, or in any manner not involving their mutual co-operation. On the other hand is the class which may not acquire such majority, and which consists of any two or more persons who get the same by concert of action. The classification is void, because arbitrary and without reason, and without just relation to the object of the law—because the one class is as likely to use its shares in violation of law as is the other, and has the same selfish interest to serve, and has the same incentives to disregard the law.

FIFTH.

As construed and applied by the Circuit Court, the statute is unconstitutional because without due process of law, it would deprive these defendants and all others who sold to the Securities Company of their property.

As already said, the transactions consisted of a sale by the stockholders to the Securities Company; or, if the corporate form of the transaction be left out of view, of a sale by each stockholder of an interest in his shares to every other stockholder. One of the objects of this suit is to annul all sales of stock of the Railway Companies to the Security Company, and to cancel all certificates of stock of the latter company issued in purchase thereof. Even if there were any prohibition in the premises on the Railway Companies, it would not apply to their stockholders.

In *Pullman Car Co. vs. Missouri Pacific Co.*, 115 U. S., 587, there was an agreement by a railway company to haul cars over all roads which it controlled or might control by ownership, lease or otherwise. It was held that this did not oblige it to haul cars over the connecting road of another company in whose stock it acquired subsequently to the agreement a controlling interest. The point decided was that an obligation resting upon a company did not apply to a stockholder therein. The court said as to the position of the latter: "Its rights and its powers are those of a stock-" holder only. It is not the corporation, in the sense of that " term as applied to the management of the corporate busi-" ness or the control of the corporate property" (p. 597).

So, too, in *Wattson v. Bonfils*, 116 Fed. Rep., 157, it was held that a corporation and its stockholders are entirely different entities, even although all the stock is held by one person.

To the same effect are *American Preservers Co. vs. Norris*, 43 Fed. Rep., 711; *Electric Co. vs. Jamaica Co.*, 61 Fed. Rep., 655, 678.

Any effort to limit the right to sell necessarily would deprive these defendants of their property without due process of law. " The value of property results from the use to which it is put and " varies with the profitableness of that use, present and prospective " actual and anticipated. There is no pecuniary value outside of " that which results from such use" *(Cleveland Co. vs. Backus*, 154 U. S., 439, 445). " The value of property is determined by what it can " be bought and sold for" *(People ex rel. Manhattan Co. vs. Barker*, 146 N. Y., 304, 312). " Salability is an essential element of prop-" erty, and the destruction or the diminution thereof is a taking of " property that cannot be done except through the exercise of the right of eminent domain, or of the police power" *(Ingersoll vs. Nassau Co.*, 157 N. Y., 453, 463). " Depriving an " owner of property of one of its essential attributes, is depriving " him of his property within the constitutional provision, and a " legislative declaration that upon the publication of notice a nego-" tiable security shall no longer be transferable, is not due process " of law, working a forfeiture of the right given by the contract" *(People ex. rel. Manhattan Institution vs. Otis*, 90 N. Y., 48, 52). Such an effort to prevent the sale of property or to regulate the conditions on which the owners might sell the same would be unconstitutional because it would deprive the owners of their property without due process of law *(Holden vs. Hardy*, 169 U. S., 366, 391; *People vs. Marx*, 99 N. Y., 377, 386; *People vs. Gillson*, 109

N. Y., 389; *Forster vs. Scott*, 136 N. Y., 577; *Ingersoll vs. Nassau Co.*, 157 N. Y., 453, 463; *Purdy vs. Erie R. R. Co.*, 162 N. Y., 42, 49; *City vs. Collins Baking Co.*, 39 App. Div., 432; *Rochester Turnpike Co. vs. Joel*, 41 App. Div., 43; *People vs. Meyer*, 44 App. Div., 1; *Ingraham vs. National Salt Co.*, 72 App. Div., 582; *Janesville vs. Carpenter*, 77 Wisc., 288, 301).

It has been already pointed out that the sale being lawful, the motive is immaterial *(supra*, pp. 6, 7). This principle seems to sufficiently answer the doctrine of *Commonwealth vs. Pennsylvania Co.*, 1 Pa. C. C., 214, that the lawfulness of a sale may be denied because of the motive of the purchaser.

If complainant's contention should be sustained, the right of an owner of property to sell the same would be dependent upon what the courts at any future time might hold to be the intention of the purchaser in buying the property. Such a result would seriously impair the liberty of the owner, and the value of his property.

SIXTH.

But whatever view be taken of the character of the transaction, the decree of the Circuit Court transcended the authority of the Court under the statute, which was the sole ground and source of its jurisdiction.

Upon this point it is sufficient to refer to the keen dissection of the terms of the decree by Mr. Thorndike (pp. 34, 35).

> " By s. 4 of the statute the court has jurisdiction "*to prevent and restrain violations of this act.*" The decree, " after enjoining the Northern Securities Company from acquiring any further stock of either of the two railway companies, also enjoins it from voting at any meeting of the " stockholders of either of them or exercising any control or " influence over their acts and doings, and enjoins the two " railway companies from paying it any dividends on account " of the shares, with a proviso declaring that it shall not be " prevented by the decree from returning the shares. This " puts the entire control of the affairs of each of the railway " companies into the hands of a minority of the shareholders,

" and takes away from the owner of a majority of the shares " the power of using even its influence for the protection of " its property. It leaves to the Northern Securities Com- " pany the property in the shares, but without the right to " the dividends, which is the only thing that gives them any " value. A return of the shares would not carry with it any " right to dividends payable during the time when the shares " were held by that company. The result is that, according " to the decree, nobody can ever receive those dividends, " and they are thus confiscated for the benefit of the railway " companies.

" The part of the decree that relates to the dividends " has nothing to do with the object of preventing the sup- " pression of competition, and is only punishment, and the " act gives no authority to inflict such punishment. The " receipt of the dividends would not affect competition and " would not be a violation of the act.

" The part that restrains voting and exercising any con- " trol or influence, does more than prevent the Northern " Securities Company from using its power to suppress " competition. It would not be a violation of the act to " vote or to exercise control and influence as to matters " that concerned only traffic within any one state, or that " did not relate to commerce between different states. " Even as to matters that did relate to commerce between " the states, it would not be a violation of the act if the " control was so exercised as not to interfere with competi- " tion.

" In the *Addyston Pipe Co.'s case*, where an agreement " had been made to restrict the sales and prices of iron pipe " in several states, the Supreme Court was careful to limit " the decree so that it should not apply to transactions " wholly within any one state, as they would not be within " the provisions of the act. If a similar course had been fol- " lowed in the present case, the decree would only have en- " joined the Northern Securities Company from doing what " would have been (according to the decision) a violation " of the act, namely, using its control or influence in such " a way as to suppress competition in so much of the traf- " fic of the two railways as was carried on between differ- " ent states. The only ground upon which the act is held " to have been violated is that the acquisition of the shares " gives a power to suppress competition, which is likely to " be exercised, but if the exercise of the power is restrained, " the evil is prevented. This power too would continue only " so long as the controlling interest in both railway com- " panies was retained, and would cease if the Northern Se- " curities Company should cease to hold a majority of the

" shares in one. Therefore the injunction should also have " been limited to the time during which it might hold a con- " trolling interest in both of them. The decree could not " have gone beyond that without exceeding the jurisdiction " given to the court 'to prevent and restrain violations of " 'this act.'"

CONCLUSION.

The judgment of the Circuit Court should be reversed and the petition dismissed.

The very important point as to the power of Congress, as well as other points sufficiently presented in the other briefs, need not be repeated here.

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FRANCIS LYNDE STETSON,
DAVID WILLCOX,
Of Counsel for Appellants Morgan, Bacon and Lamont.